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COURT OF CRIMINAL APPEALS
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In the Court of Criminal Appeals
of Texas

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COURT OF CRIMINAL APPEALS
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CHARLIE RILEY,
Appellee
v.
THE STATE OF TEXAS
Appellant

On Discretionary Review
From the Ninth Court of Appeals
No. 09-17-00124-CR

APPELLEE RILEY'S BRIEF ON THE MERITS

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Visiting Judge, 221st Judicial District
Montgomery County

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STATEMENT OF THE CASE

County Judge Craig Doyal and County Commissioner Charley Riley were indicted for violating § 551.143 of the Texas Open Meetings Act (hereinafter "TOMA"). The indictments alleged that Doyal and Riley:

> . . . knowingly conspired to circumvent [TOMA] by meeting in a number less than a quorum for the purpose of secret deliberations in violation of the Texas Open Meetings Act, to-wit: by engaging in a verbal exchange concerning an issue within the jurisdiction of the Montgomery County Commissioners Court, namely, the contents of the potential structure of a November 2015 Montgomery County Road Bond.

CR5. Mark Davenport was charged with the same conduct as a party. CR [Davenport] 5.

Appellees moved to dismiss the indictment asserting that § 551.143 was facially unconstitutional because it violates the First Amendment and is vague and overbroad. CR [Doyal] 45-67; CR35-37. The trial court held an evidentiary hearing on the motion and heard testimony from lawyers specializing in TOMA and individual members of various government bodies. The trial court granted the motion and ordered the indictments dismissed. CR42.

The State appealed raising two issues: (1) the trial court erred by dismissing the indictment on the ground that § 551.143 is facially unconstitutionally vague and ambiguous, and (2) the trial court erred by dismissing the indictment on the ground that § 551.143 facially violates the First Amendment and is overbroad.

The Ninth Court of Appeals issued an unpublished memorandum opinion reversing the trial court's order for the reasons stated in *State v. Doyal*, __S.W.3d__, 2018WL761011 (Tex. App.—Beaumont, February 7, 2018, pet. filed). Mem. Op. at 3.

Statement of the Issues

Issue One: TOMA § 551.143 is unconstitutionally vague and ambiguous.

Issue Two: TOMA § 551.143 facially violates the First Amendment of the United States Constitution and is overbroad.

BACKGROUND FACTS

Building and maintaining local roads has been a top priority for the Montgomery County commissioner's court as the county has grown dramatically.[1] The voters passed a $160 million road bond package in 2005, but they rejected one in 2011 because it failed to specify the projects for which the money would be used.

In January of 2015 the commissioners appointed a ten-member citizens' committee that compiled a list of 77 specific projects and put together a $350 million road bond project. But the voters, led by Tea Party opposition, defeated the proposal on May 9, 2015.

In August the Tea Party groups gave in to public pressure and signaled to the commissioners that they were serious about finding a solution. During the public

[1] This factual statement was recited in Appellee Craig Doyal's Motion to Dismiss, which Appellee Charlie Riley joined by written motion. CR15.

comments period of the August 11th Regular Commissioners Court Meeting, retired County Judge Alan B. Sadler said that the "opposition" was ready to work on a revised road bond package for the November election.

On August 20th and 21st Judge Doyal and Commissioner Riley along with political consultant Marc Davenport met with representatives of the Texas Patriots PAC group ("Patriots PAC") to discuss a less expensive bond referendum for the November ballot. The meetings resulted in a Memorandum of Understanding (MOU) in which nothing was promised except for the political support of the Patriots PAC if the commissioners put a road bond proposal on a Special Meeting agenda. The Patriots PAC, Commissioner Riley, and Judge Doyal issued press releases on the 21st explaining the developments and publishing for the public the entire MOU including exhibits. Judge Doyal posted the agenda for a special Commissioners Court Meeting for August 24th, the deadline for the November ballot.

At the special meeting citizens spoke in favor of the bond and the commissioners unanimously voted for the smaller $280 million bond package. After some press "open records" requests were made, County Attorney J.D. Lambright advised Judge Doyal in writing that the commissioners had complied with the Open Meetings Act and that there was no basis for voiding the vote to put the bond package on the ballot. The compromise was successful—the new road

bond passed with 60 percent in favor even though the earlier May bond proposal had failed with 60 percent opposed.

RELEVANT STATUTES

TOMA requires a governmental body to meet in properly noticed public meetings unless the governmental body is expressly authorized by law to discuss an item in closed session. *See* Tex. Gov't Code Ann. §§ 551.002 (West 2017) ("Every regular, special, or called meeting of a governmental body shall be open to the public, except as provided by this chapter."), .041 (notice), .071-.086 (exceptions to requirement that meetings be open).

"Meeting" is defined as "a deliberation between a quorum of a governmental body or between a quorum of a governmental body and another person during which public business or public policy over which the governmental body has supervision or control is discussed or considered or during which the governmental body takes formal action." *Id.*, § 551.001(4) (West 2017).

"Deliberation" is defined as "a verbal exchange during a meeting between a quorum of a governmental body or between a quorum of a governmental body and another person concerning an issue within the jurisdiction of the governmental body or any public business." *Id.*, § 551.001(2) (West 2017).

Section 551.143 (the conspiracy statute) provides:

> A member or group of members of a governmental body commits an offense if the member or group of members knowingly conspires to circumvent this chapter by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter.

Id., § 551.143 (West 2017).

> TOMA's other criminal provision prohibits illegal closed meetings:
>
> A member of a governmental body commits an offense if a closed meeting is not permitted under this chapter and the member knowingly:
>
> (1) calls or aids in calling or organizing the closed meeting, whether it is a special or called closed meeting;
>
> (2) closes or aids in closing the meeting to the public, if it is a regular meeting; or
>
> (3) participates in the closed meeting, whether it is a regular, special, or called meeting.

Id., § 551.144(a). This section provides an affirmative defense if the member "acted in reasonable reliance on a court order or a written interpretation of this chapter contained in an opinion of a court of record, the attorney general, or the attorney for the governmental body." *Id.*, § 551.144(c). Section 551.143 does not provide any affirmative defenses.

HEARING TESTIMONY

A. Movants' Witnesses

1. Alan Bojorquez

Alan Bojorquez is an administrative lawyer with a master's degree in public administration. Bojorquez has provided guidance and training on TOMA to local government officials across the State for two decades as in-house counsel for the Texas Municipal League and in private practice. 2RR23-25. He has studied TOMA and similar statutes closely and has spoken on the subject at dozens of seminars. 2RR25-27.

Bojorquez testified that the conspiracy statute receives frequent attention but is poorly understood. 2RR32, 34. He finds compliance with § 155.143 difficult because it seems to criminalize First Amendment speech—talking about public affairs—and there is no appellate guidance on the statute. 2RR34-36. Bojorquez acknowledged that the overall purpose of TOMA is to provide a framework for how government decision-making should be conducted—in meetings with a posted agenda, notice to the public, and minutes of what took place—so that the public has access to the deliberation process. 2RR34, 40. The aim of the conspiracy statute is to penalize those who to avoid the statute by "cooking the deal" outside of the view of the public. 2RR40. But Bojorquez finds the conspiracy statute nonsensical and riddled with drafting errors. 2RR41, 58. Bojorquez opined that a

person of reasonable intelligence, or even an expert, would be confused by the language of the statute. 2RR81.

Bojorquez identified numerous drafting errors that together render the statute hopelessly unclear:

1. **"conspires"**: this term is not defined; it is not clear whether its meaning should derive from the Penal Code, common law, or common usage (2RR43-44).

2. **"member or group of members"**: it is unclear whether the statute applies only to members of government bodies or also to members of the public (2RR43, 78). The language suggests that one member could be guilty of conspiring with himself (2RR43, 78, 82-83).

3. **"circumvent"**: this undefined term is ambiguous; one common meaning is "avoid," but some construe the term to mean "violate." Bojorquez had difficulty advising a member of a government body seeking advice on how to legitimately avoid the reach of TOMA with no intent of violating it (2RR149-50).

4. **"meeting in numbers less than a quorum"**: the term "meeting" is unclear because "meeting" is defined as "a deliberation between a quorum of a governmental body …". The attorney general attempted to resolve this incongruity by advising that the definition of "meeting" does not apply in the conspiracy statute because it is used as a verb.

5. **"secret deliberations"**: "deliberation" is defined as "a verbal exchange during a meeting between a quorum of a governmental body …". By definition "deliberation" requires a quorum so it is nonsensical to prohibit meetings of less than a quorum for the purpose of "secret deliberations" (2RR54-56). The term "meeting" within the definition of "deliberation" also requires a quorum (because it is used as a noun). Also, it is unclear whether a "verbal exchange" includes only oral/spoken communications or also written communications such as e-mail or text messages (2RR45-48, 54-55). "Secret" is undefined and ambiguous—does it mean any circumstance other than a posted public meeting, even if the discussion occurs in a public place with reporters and citizens present? (2RR106).

6. **"in violation of this chapter"**: this language is confusing because the remainder of TOMA governs only the conduct of quorums and contains no rules for non-quorum gatherings. It is nonsensical to criminalize "meeting in numbers less than a quorum . . . in violation of this chapter" (2RR45-46, 80, 181-82).

Bojorquez testified about the significant chilling effects stemming from the vague aspects of the statute. Bojorquez noted that "deliberation" by definition includes discussion of "any public business." 2RR56. Because the conspiracy statute prohibits "deliberations" by non-quorum gatherings, it severely restricts the speech of members of government bodies. 2RR56. Bojorquez advises clients to err on the side of compliance in many situations despite the often inconvenient and

counterproductive consequences. 2RR62-63. Bojorquez has advised his clients not to respond to e-mails, to carefully monitor subcommittees, and to avoid written communications. 2RR55, 62-63. Bojorquez advised a subcommittee against conducting a private interview of a job candidate who wanted to be discreet. 2RR63. Officials are advised to post notice of a potential quorum prior to attending private social events. 2RR65. A mayor was advised to post notice and an agenda before holding a town hall meeting if it was conceivable that a quorum may attend. 2RR123-24. A member of a government body was advised to refrain from discussing any public matter with a citizen, unless the member can be certain that the citizen is not having similar discussions with another member of the government body. 2RR79, 120-21. Bojorquez observed that the vague terms of the statute result in more power and decision-making being delegated to government staff and away from elected officials, because elected officials have to be "so careful about their communications." 2RR76.

Bojorquez pointed out that, unlike § 551.144 (criminalizing illegal closed meetings), § 551.143 does not provide an affirmative defense for an official who relies on written legal advice. 2RR158-60, 176, 186.

Bojorquez opined that the statute is unenforceable due to its vagueness and overbreadth. 2RR68-69. He characterized the conspiracy statute as a prior restraint on political speech that deters conversations in public life that would otherwise be

perfectly legal. 2RR66, 152. Furthermore, the conspiracy statute goes beyond merely requiring disclosure of speech because it subjects speech to temporal delays and other conditions unrelated to disclosure, such as a quorum. 2RR199-201. Bojorquez also found that the conspiracy statute is not necessary to effectively enforce TOMA because compliance could be adequately achieved through civil sanctions (injunctions, the voiding of actions taken in violation of TOMA, and attorney's fees awards) and criminal sanctions for illegal closed meetings pursuant to § 551.144. 2RR71-72, 177-78.

2. Jennifer Riggs

Jennifer Riggs is a board-certified administrative lawyer with 32 years' experience. She began her career at the attorney general's office writing TOMA opinions and advising state agencies on TOMA. 3RR10, 14-15, 20, 25. Since entering private practice Riggs has litigated TOMA cases and published articles on the topic. 3RR14-15, 33. Riggs testified that several attorney general advisory opinions about the conspiracy statute are impossible to reconcile with its text. Riggs disagrees with a 2005 opinion[2] advising that the statute is directed at "walking quorums":

> We construe Section 511.143 to apply to members of a governmental body who gather in numbers that do not physically constitute a quorum at any one time but who, through successive gatherings, secretly discuss a public matter with a quorum of that body. In

[2] State's Exhibit 2, Tex. Att'y Gen. Op. No. GA-0326 (2005).

> essence, it means a daisy chain of members, the sum of whom constitute a quorum that meets for secret deliberations.

3RR169. She characterized the opinion as a strained attempt to save the statute from unconstitutionality that amounted to rewriting the statute. 3RR102-103. Specifically, TOMA's definitions of "meeting" and "deliberation" cannot be reconciled with the attorney general's conclusion that a quorum need not convene "at any one time" but may be formed "through successive gatherings." 3RR170-73. Riggs suggested that a properly-drafted conspiracy statute would specifically prohibit "meeting in numbers of less than a quorum for the purpose of sequential or multiple secret deliberations that would together constitute a quorum." 3RR41.

Riggs also questioned an attorney general opinion advising that subcommittees are not subject to TOMA as long as they are purely advisory. 3RR21-22. Riggs finds this opinion problematic because the express terms of the conspiracy statute would encompass these activities and prosecutors are not bound by attorney general opinions. 3RR59-60. Additionally, the attorney general has warned that an advisory subcommittee might run afoul of TOMA if the governmental body were to "rubberstamp" its recommendation, so that a member might not know until after the fact whether his conduct violated the conspiracy statute. 3RR63.

Like Bojorquez, Riggs identified serious ambiguities in the text that rendered the statute incomprehensible. The term "deliberations" in the conspiracy

statute is vague and circular because "deliberation" by definition requires a quorum, so "the very conduct that is excluded under the definitions under 551.001 is then brought back in under 551.143." 3RR24, 95-96, 98. The conspiracy statute is paradoxical because "the very act of trying to keep it legal [by meeting in less than a quorum] could be what helps prove, under 143, a conspiracy." 3RR47. Riggs contrasted § 551.144 in which the terms are used consistently with their definitions under TOMA. 3RR36.

Riggs testified that the conspiracy statute is facially unconstitutional because it goes beyond simply requiring disclosure: it prohibits an entire category of speech and is not narrowly tailored to achieve a legitimate government purpose. 3RR38, 80. The statute goes beyond requiring disclosure because it bans speech between elected officials and constituents, who have no right to speak at a meeting. 3RR211. By its express terms the conspiracy statute prohibits a member from communicating one-on-one with a member of the public about a policy issue; thus, members of the public are effectively denied access to elected officials. 3RR28-29. She found the statute overbroad in that it "kill[s] all the communications with constituents," thereby denying elected officials their constitutional right to discuss policy issues with the public. 3RR38, 79. This in turn interferes with an elected official's ability to fulfill the oath to represent everyone in the district. 3RR87-88.

Riggs noted that the text of the conspiracy statute reached conduct state legislators routinely engage in: private consultations to tally the number of votes in support of a potential bill. 3RR91-94, 247. Moreover, because the attorney general has advised that "meeting" does not require physical presence, the statute could prohibit a member of a government body from writing a blog about policy issues (particularly if another member posted a comment), or maintaining a public social media forum (such as a Facebook page) that could be accessed by other board members. 3RR34-37.

Riggs testified that neither those who receive the required training nor seasoned experts can ascertain what conduct is proscribed by the conspiracy statute, and this confusion has persisted for decades. 3RR75-76. The ambiguity forces attorneys to give very restrictive advice that interferes a member's ability to communicate with constituents. 3RR41-42. The result is that the only place members could ever safely talk about any kind of public business in a posted meeting. 3RR48. Riggs believed the statute's vague text allows for arbitrary enforcement, providing a vehicle for prosecutors to selectively target officials for political reasons. 3RR50, 61.

3. Charlie Zech

Charlie Zech is an attorney with a master's degree in public administration and more than 15 years' experience representing government entities. 4RR11-12. Zech conducts workshops on TOMA for newly elected officials. 4RR11-12.

Zech also identified multiple ambiguities in the text of the statute, including the lack of a definition for "conspire," "secret," and "circumvent," which are subject to different interpretations (4RR20-21, 77, 81-82); ambiguity as to whether a single member could "conspire" alone (4RR20-21); ambiguity as to whether a member of the public could violate the statute (4RR22); ambiguity as to whether "deliberations" includes written communications (4RR24); and the apparent conflict between the terms "meeting" and "deliberations" and their provided definitions.

Zech believed that the statute "prohibits a very broad amount of activity" on behalf members of governing bodies and possibly members of the public, and gives too much discretion to prosecutors and juries. 4RR18, 24-27. 84-85. Accordingly, he advises members of government bodies to refrain from talking to each other outside of posted meetings. 4RR28-29. Zech believed that the statute captures a substantial amount of innocent conduct, noting that members of government bodies are often unpaid volunteers with no legal or administrative training. 4RR11-12, 27.

4. Members of Government Bodies

There was also testimony from several individual members of various governmental bodies who have wrestled with the application of the conspiracy statute.

James Kuykendall has been Mayor of Oak Ridge North for six years and has served on several commissions and boards. 3RR110. Mayor Kuykendall testified that the conspiracy statute "neuters everybody" with regard to their ability to educate themselves about important issues. 3RR111. The city attorney had warned him to avoid discussing issues with council members or constituents outside of formal meetings because it was better to be "safe than sorry." 3RR122-23. As a result, council members cannot educate themselves on agenda items beyond what is prepared by the city manager.[3] 3RR114. Kuykendall felt like he served only as a "figurehead," disconnected from the government process. 3RR116. Because of the restrictions on communications, scheduled meetings are often several hours long, burdening council members who have regular full-time jobs. 3RR112-13.

Charles Jessup is Mayor of Meadows Place, a one-square-mile city with limited staff and resources. 2RR234. He had a diverse employment background but no formal legal training prior to being elected mayor. 2RR223-24. Jessup and the city's five council members are essentially volunteers who are paid trivial stipends.

[3] Kuykendall felt vulnerable to prosecution by virtue of getting information for the city manager because she consults with other council members. 3RR116-17.

2RR225. Because the council members have other employment it is difficult to form a quorum and they meet regularly only once a month. 2RR230-34. Despite Jessup's ten years' experience as Mayor, he finds TOMA "very convoluted and confusing" and feels that "we can't do anything." 2RR226.[4] Even after attending numerous TOMA training sessions, Jessup and the city council members remain anxious about having improper conversations and ending up in jail. 2RR226, 235. He is leery of even answering casual unsolicited questions from constituents. 2RR230. He frequently feels obligated to terminate a conversation with a council member if he notices other council members nearby. 2RR228-29, 248-49. Because of the criminal penalties, Mayor Jessup feels uncomfortable talking with more than one council member, which hinders his ability to gather information on policy issues, prioritize potential agenda items, solicit others' opinions, and otherwise do his job. 2RR231-234, 239-40, 269.

Eric Scott, Mayor of Brookshire, has no formal legal training but has taken advantage of all training opportunities during his two terms as mayor. 2RR258-60. While Scott agrees with TOMA's transparency objectives, in his experience the conspiracy statute hinders the free exchange of ideas at the expense of good governance. 2RR261. The statute's vagueness leaves him with the impression that elected officials "can go to jail very easily." 2RR265. Scott finds it confusing that

[4] Jessup recounted that he voiced his concerns about the stringent requirements of TOMA to an acquaintance in the State legislature, who responded that the legislature had exempted itself from TOMA because otherwise they would "never get anything done." 2RR255.

TOMA's rules generally apply only to meetings of a quorum but the conspiracy statute also prohibits of meetings of less than a quorum. 2RR262. He testified that the term "circumvent" is unclear as to whether it means "go around" or violate, and observed that the conspiracy statute could not be reconciled with TOMA's definitions of "meeting" and "deliberation." 2RR267-70. These ambiguities constrained Scott to avoid public policy discussions among more than two people. 2RR270-71. He avoided engaging in even casual conversations with council members as he walks through the lobby to his office, while lamenting the fact that informal conversations often yield more information than formal discussions in posted public meetings. 2RR263-65.

B. State's Witnesses

1. James G. Rodriguez

James Rodriguez has twelve years' experience serving as a Houston city council member and chief of staff to a council member. 5RR6-7. Rodriguez received TOMA training in conjunction with new council member orientation. 5RR8.

Rodriguez testified that the statute did not hinder his work or restrict his ability to converse with other council members or constituents. 5RR14-15, 18, 31. Rodriguez understood the conspiracy statute to prohibit discussing city business with less than a quorum. 5RR11. But Rodriguez testified that he "erred on the side

of caution" and tried to avoid having "any type of meetings or deliberations" in less than a quorum. 5RR13.

When pressed Rodriguez acknowledged that he regularly discusses city business with less than a quorum in a variety of circumstances. He routinely participated in one-on-one meetings with other council members to discuss policy, or even a series of one-on-one meetings amongst several members discussing the same topic. 5RR23, 32, 35, 59. By his reading, certain circumstances could render otherwise illegal private policy discussions proper in less than a quorum: if no more than two members were present (5RR23, 32, 35); as long as he was not "trying to form quorums" (5RR14-18); if someone else set up the meeting (5RR25, 56); or if he only listened and did not "participate" (5RR56).

Rodriguez believed that the statute does not reach discussions conducted only to educate and inform, rather than make decisions (5RR14-15, 18, 29, 31, 40), but vacillated and acknowledged that the statute could prohibit meeting in less than a quorum to "just deliberate over the item" without making a firm commitment. 5RR34. Nevertheless, Rodriguez maintained that it was proper and beneficial to "make the rounds," i.e., meet one-on-one with council members to determine who supported an agenda item. 5RR32, 40-41. Rodriguez was aware that staff of council members, and occasionally council members, attend regular agenda

meetings to go over the upcoming agenda, share information, and voice concerns about agenda items. 5RR41-44.

2. Joel White

Joel White is an attorney in private practice with a focus on First Amendment media law. 5RR63. White has assisted the attorney general in conducting seminars on TOMA and frequently interprets TOMA in his capacity as a hotline attorney for the Freedom of Information Foundation. 5RR63-66.

White testified that the conspiracy statute is not vague, yet he characterized it as a "complicated act" because to understand it "you have to put together" numerous court cases, attorney general's opinions, and penal code provisions. 5RR100. White believed that the conspiracy statute prohibits only conspiring to meet in less than a quorum "in order to have secret deliberations and to eventually reach a quorum," or attempting to "form a secret quorum" to make a decision about public policy. 5RR68, 77. In White's view a series of one-on-one discussions to ascertain which council members supported a project would not violate the statute. 5RR124. However, White disagreed with Rodriguez's opinion that "deliberation" requires reaching a decision and does not include merely informing or educating. 5RR123. He believed that the Houston city council agenda meetings described by Rodriguez could constitute a violation of the statute if a staff member discussed public business on behalf of a council member. 5RR136.

3. Adrian Garcia

Adrian Garcia, former Houston police officer, Houston city council member, Harris County Sheriff, Mayor Pro Tempore of Houston, and mayoral candidate, submitted a written statement. SX9. Garcia learned about TOMA by watching a short video produced by the attorney general. SX9 at 1. He understood TOMA to prohibit a "rolling quorum," i.e., "secretly meeting with other members in small but secretly linked groups." SX9 at 2. He did not feel that the statute "chilled" his ability to communicate with council members or constituents, but he limited such private discussions with other council members to groups of no more than three and only to "exchange ideas or opinions." SX9 at 2-3. Garcia also believed it was proper to have private discussions to ascertain how a member would vote on a proposal, as long as the purpose was to "measure support" for an issue and not to "form a secret quorum." SX9 at 2-3.

SUMMARY OF THE ARGUMENTS

Issue One: Section 551.143 is unconstitutionally vague and ambiguous. Its text is riddled with drafting errors that together render the statute circular, internally inconsistent, irreconcilable with the rest of the chapter, and hopelessly unclear. Several terms within the statute ("conspires," "circumvent," and "secret") are undefined and subject to multiple interpretations. Two important terms, "meeting" and "deliberation," are used in contradiction to their provided definitions; both terms are defined to require a quorum, yet § 551.143 prohibits "meeting in numbers less than a quorum for the purpose of secret deliberations." Additionally, the statute is nonsensical in that it prohibits "meeting in numbers less than a quorum . . . in violation of this chapter" while the remainder of TOMA governs only the conduct of quorums and contains no rules for non-quorum gatherings.

Due to its shoddy draftsmanship, the statute has failed to yield a single successful criminal conviction during the four decades since its enactment. The intractable ambiguity forces practitioners to advise members of government bodies to avoid discussing public business except in posted public meetings. This restrictive advice chills important protected speech and thwarts elected officials' ability to become informed about issues. Because neither average citizens nor

experts can ascertain what conduct is prohibited, the statute is unconstitutionally vague.

Issue Two: TOMA § 551.143 facially violates the First Amendment and is overbroad. The statute is subject to strict scrutiny because it restricts speech based on its topic and function (discussions of public business). The State has not met its burden of demonstrating that the statute is narrowly tailored to serve a compelling government interest.

While government transparency is a legitimate government interest, no other state has criminalized discussing public business in less than a quorum. In relation to its legitimate sweep, the statute prohibits a substantial amount of protected "core political speech": it deters members of government bodies from communicating with one another and constituents to learn about issues or to discuss whether an issue warrants consideration by the entire governmental body. Rather than merely preventing corruption, the statute significantly hampers elected officials' ability to perform functions essential to effective government. Because the statute is not narrowly tailored and does not leave open ample alternative channels of communication, it does not pass even intermediate scrutiny. Accordingly, § 551.143 in an unconstitutional content based restriction of speech.

ARGUMENTS

Issue One: Section 551.143 is facially unconstitutionally vague and ambiguous.

A. Standard of Review

Appellate courts review de novo whether a statute is facially unconstitutional. *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013). Because the trial court did not issue findings of fact, an appellate court must view the facts in the light most favorable to the trial court's ruling. *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000).

The Fifth Amendment provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give people of ordinary intelligence fair notice of the conduct it punishes, or is so standardless that it invites arbitrary enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357–358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). Vague laws leave the line between lawful and illegal conduct to be drawn "on an ad hoc and subjective basis" by those who enforce the statute. *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). The prohibition of vagueness in criminal statutes "is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law," and a statute that flouts it "violates the first essential

of due process." *Connally v. General Constr. Co*., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926).

Criminal laws must (1) be sufficiently clear that a person of ordinary intelligence must be given a reasonable opportunity to know what is prohibited, and (2) establish determinate guidelines for law enforcement to prevent arbitrary and discriminatory enforcement. *Grayned*, 408 U.S. at 108–109, 92 S.Ct. at 2298–2299. But when a statute is capable of reaching First Amendment freedoms, vagueness doctrine demands an even greater degree of specificity: the law must be sufficiently definite to avoid chilling protected expression. *Grayned*, 408 U.S. at 109, 92 S.Ct. at 2299; *Long v. State*, 931 S.W.2d 285, 288 (Tex. Crim. App. 1996). Greater specificity is required to preserve adequately the right of free expression because "[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Grayned*, 408 U.S. at 109, 92 S.Ct. at 2299.

B. The court of appeals erred in requiring that a vague statute "always operate unconstitutionally."

The court of appeals held that Riley "failed to meet his burden to establish that the conspiracy provisions at issue always operate unconstitutionally under all possible circumstances." Slip op. at 3. But when a vagueness challenge involves First Amendment considerations, a criminal law may be facially invalid even though it may not be unconstitutional as applied to the defendant's conduct or even if the law has some valid application. *Gooding v. Wilson*, 405 U.S. 518, 521, 92 S.Ct. 1103, 1105, 31 L.Ed.2d 408 (1972); *Ex parte Ellis*, 309 S.W.3d 71, 86 (Tex. Crim. App. 2010).

Even if the statute implicated no First Amendment rights, a facial vagueness challenge need not rule out any legitimate application. The Supreme Court recently disavowed the prior standard that an unconstitutional law must be vague in all applications. In *Johnson v. United States*, -- U.S. --, 135 S. Ct. 2551, 192 L.Ed.2d 569 (2015), the Supreme Court found unconstitutionally vague the "residual clause" of the Armed Career Criminal Act, which required courts to determine whether a prior conviction involved conduct that presents "a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B); 135 S. Ct. 2551, 2555-56. The Court noted that "although statements in some of our opinions could be read to suggest otherwise, our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls

within the provision's grasp." *Id.*, 135 S. Ct. 2551, 2561 (2015). For example, a law prohibiting grocers from charging an "unjust or unreasonable rate" was struck down for vagueness "even though charging someone a thousand dollars for a pound of sugar would surely be unjust and unreasonable." *Id.*, *citing United States v. L. Cohen Grocery Co*., 255 U.S. 81, 89, 41 S.Ct. 298, 65 L.Ed. 516 (1921). The Court held that the existence of some obviously risky crimes did not establish the residual clause's constitutionality. *Id.,* 135 S. at 2561.

This Court should address the vagueness challenge by the standard set out above, without regard to whether the statute always operates unconstitutionally.

C. The conspiracy statute does not provide a person of ordinary intelligence a reasonable opportunity to know what is prohibited.

The court of appeals held that that § 551.143 describes the criminal offense with sufficient specificity that ordinary people can understand what conduct is prohibited. *Doyal*, 2018WL761011 at *5. This finding fails to apply the proper standard of review—it fails to view the evidence in the light most favorable to the trial court's ruling. The movants' expert and lay witnesses consistently testified that they do not understand the text of the statute, and even the State's witnesses exhibited significant disagreement about its meaning and scope.

1. Experienced practitioners do not know what the statute prohibits.

Appellees' experts represent some of the foremost authorities on TOMA, whose job duties have included drafting official opinions about the statute on behalf of the state and providing state-mandated TOMA training.

Each expert witness readily identified the multiple sources of vagueness in the conspiracy statute, including the lack of definitions for terms such as "conspires," "circumvent," and "secret," and the use of terms in apparent contradiction to their statutory definitions ("meeting" and "deliberation" each by definition require a quorum). These drafting errors are not merely incidental to the meaning of the statute—they go the heart of the proscribed conduct. Bojorquez admitted that "sometimes on my best day, I can't tell [clients] that they're going to violate it or not" (2RR48).

When learned and experienced professionals cannot clearly and with reasonable certainty ascertain the scope and meaning of a statute from the face of the statute, an average citizen cannot reasonably be expected to do so.

2. The court of appeals erred in relying upon an attorney general advisory opinion and failing to apply the strict construction required for criminal statutes.

Aside from the fact that attorney general opinions are merely advisory and cannot rewrite the statute, the experts pointed out that the statutory ambiguities have only been compounded by attorney general advisory opinions that "try to

interpret it in a way that would render it constitutional" but only create more "controversy and uncertainty." (3RR85). For example, the attorney general has advised that "meeting" does not require physical presence (3RR34, 180-81), and that "deliberation," which is defined as a "verbal exchange," may also include written communication. (2RR45, 54-55).[5] These interpretations create additional layers of ambiguity and further remove its facial text from the comprehension of an ordinary person.

Most brazenly, in 2005 the attorney general advised that the conspiracy statute is intended to target "successive gatherings" or "a daisy chain of members, the sum of whom constitute a quorum." The attorney general attempted to resolve the problem of the definition of "deliberation" by concluding that "'meeting in numbers less than a quorum' describes a method of forming a quorum."[6] The court of appeals expressly relied on this construction in finding that the terms in § 551.143 are not vague and self-contradictory. *Doyal* at *5

This construction is so far removed from the plain language it is no surprise that the expert witnesses characterized it as "rewriting" the statute (2RR58, 3RR102-103). The court of appeals' adoption of this construction is erroneous

[5] Tex. Att'y Gen. Op. No. JC-0307 (2000) at 5-6 (explaining that the term "verbal" may include the expression of something in words generally rather than the expression of something in spoken words only); Tex. Att'y Gen. Op. No. GA-0896 at 2 (2011) (concluding that electronic communications could, depending on the facts of a particular case, constitute a deliberation and a meeting that must comply with the Act).

[6] Tex. Att'y Gen. Op. No. GA-0326 at 2 (2005).

because the attorney general relied solely on civil cases in interpreting the statute to target "successive gatherings." *Id.,* citing *Esperanza Peace & Justice Ctr. v. City of San Antonio*, 316 F.Supp.2d 433, 473, 476 (W.D. Tex. 2001). Civil courts must construe statutes liberally to effectuate the legislative purpose. *Esperanza,* 316 F. Supp. 2d at 472 (construing TOMA's provisions liberally in favor of open government). But ambiguity in the ambit of a criminal statute's coverage must be resolved in favor of the accused to ensure that there is fair warning of the boundaries of criminal conduct. *Crandon v. United States*, 494 U.S. 152, 158, 110 S. Ct. 997, 1001–02, 108 L. Ed. 2d 132 (1990); *State v. Johnson*, 219 S.W.3d 386, 388 (Tex. Crim. App. 2007) (criminal statutes outside the penal code must be construed strictly with any ambiguity resolved in favor of the accused).

In finding that this construction is "discernible from a plain reading of the provision," the court of appeals failed to apply the strict construction required for criminal statutes. It is not enough that a particular construction is "discernable" from a liberal reading of the text. *See State v. Cortez*, 543 S.W.3d 198, 206 (Tex. Crim. App. 2018), reh'g denied (Mar. 21, 2018) (refusing to apply a broad interpretation to criminal statute because courts have a duty to narrowly construe statutes in favor of the accused).

Construing the statute strictly, there is nothing in its plain language about sequential, successive, or serial deliberations. No ordinary person would

understand the phrase "meeting in numbers less than a quorum" to nonsensically mean "a method of forming a quorum." The constitution demands that laws be sufficiently clear to a person of ordinary intelligence; it does not require an ordinary person to be familiar with attorney general advisory opinions, which are not even binding on prosecutors.

A court may not "rewrite" a law to resolve ambiguous language in order to avoid serious constitutional doubts. *United States v. Stevens*, 559 U.S. 460, 481, 130 S. Ct. 1577, 1591-92, 176 L. Ed. 2d 435 (2010). Nor may a statute be upheld "merely because the Government promised to use it responsibly." *Ex parte Thompson*, 442 S.W.3d 325, 350 (Tex. Crim. App. 2014); *Stevens*, 559 U.S. at 480, 130 S. Ct. at 1591. The attorney general's liberal "daisy chain" interpretation is a strained attempt to rewrite an unconstitutionally vague and overbroad statute and a clear derogation of the required strict construction.

3. Ordinary citizens cannot predict which actions fall within the scope of the statute.

The witnesses who have served on government bodies testified that the statute's ambiguities create a minefield of uncertainty that pervades every aspect of their duties, from speaking to constituents to educating themselves on agenda items (2RR230-234, 239-40; 3RR114, 122-23). They described feeling leery of having even casual conversations with other members or constituents for fear of creating the appearance of a violation (2RR230, 263-64).

Even the State's witnesses demonstrated significant confusion and disagreement about the reach of the statute. Rodriguez vacillated on whether the statute prohibits discussions for the sole purpose of "educating and informing" rather than making decisions. He initially testified that such discussions are not covered by the statute, but later testified that the statute could prohibit "just deliberating over the item" or "discussing the item" without making a commitment (5RR29, 34-35). Garcia believed that private discussions with other council members solely to "exchange ideas or opinions" are lawful (SX9 at 2). White disagreed—he thinks "deliberation" can include merely informing or educating, and did not require reaching a decision (5RR123).

Rodriguez further revealed his lack of confidence in his understanding of the statute by repeatedly testifying that he "erred on the side of caution" and tried to avoid having "any type of meetings" in less than a quorum (5RR13, 25).

Incongruously, he later advanced a series of arbitrary conditions that he believes would render such meetings lawful: if no more than two members are present (5RR23, 32, 35); if someone else sets up the meeting (5RR25, 56); or if he only listens and does not "participate" (5RR56).

Rodriguez described routine city council agenda meetings during which staff of council members, and occasionally council members themselves, discuss the upcoming agenda, sharing information and voicing concerns (5RR41-44). But White opined that these agenda meetings could constitute a violation of the statute if a staff member discussed public business on behalf of a council member, while also acknowledging that "the staff members are supposed to speak for the council members" (5RR136-38).

There was little consensus among the State's own witnesses on what conduct is prohibited, even with regard to the most basic, everyday tasks. In fact, White even described the conspiracy statute as "a complicated act" because to understand its meaning one has to synthesize numerous court cases, AG opinions, and penal code provisions (5RR100). This is an unreasonable burden for the average government body member, especially considering that many are unpaid volunteers with no legal or administrative training (4RR11-12, 27).

The court of appeals' suggested definitions do nothing to resolve the statute's ambiguity. In attempt to show that the statute's undefined terms have

plain meanings, the court of appeals supplied two dictionary definitions for "conspire," three definitions for "circumvent," and two definitions for "secret." *Doyal* at *4. The court of appeals defined "conspiring" as making an agreement to do some act or plotting together. *Id.* But every discussion necessarily involves at least a tacit agreement, so this definition does nothing to rein in the statute's ambiguous scope. The court of appeals' definitions for "circumvent" ("to overcome or avoid the intent, effect, or force of: anticipate and escape, check, or defeat by ingenuity or stratagem: make inoperative or nullify the purpose or power of esp. by craft or scheme") encompass a broad range of conduct. Members may legitimately endeavor to conduct informal discussions in less than a quorum so as "avoid" triggering TOMA requirements with no intention of violating the law, just as a citizen can legally avoid paying taxes. Have they conspired, i.e., agreed, to "avoid" the reach of TOMA?

The court of appeals' suggested definitions of just those three terms are subject to many permutations, some of which embrace wholly innocuous conduct, creating an intolerable risk of arbitrary application. Due process requires that laws establish determinate guidelines to prevent and avoid arbitrary enforcement "on an ad hoc and subjective basis." *Grayned*, 408 U.S. at 108-109.

Where even the State's witnesses demonstrated confusion over the application of the statute with regard to basic functions, the evidence, viewed in the

light most favorable to the trial court's ruling, does not support the court of appeals' finding that "the terms at issue have a plain meaning." *Doyal* at *4.

4. Jurors would be left with even more uncertainty in trying to determine what the statute means.

Jurors in the trial of a criminal case under the conspiracy statute would be left to decide for themselves what the statutorily undefined terms mean – without any meaningful guidance from the court in the jury charge.

It is well established that in charging a jury in a criminal case the court should provide statutory definitions for words in a statute and should not define words in the statute that are not defined by the statute. *Resendiz v. State*, 112 S.W.3d 541, 550 (Tex. Crim. App. 2003); *Alexander v. State*, 906 S.W.2d 107, 111 (Tex. App.–Dallas 1995, no pet). Instead, jurors are instructed to give undefined words their common meaning – as determined by the jurors. *Id.* It takes very little imagination to realize the nightmare of confusion that this would cause with respect to charging a jury under § 551.143 of TOMA, not to mention the confusion and uncertainty that would befall the jury.

Should the trial court define "deliberate" and "meeting" in § 551.143 as they are defined in TOMA, even though those definitions are facially incongruous, or should the trial court leave it to the lawyers to argue and the jurors to decide whether these terms are governed by the statutory definitions or their common meanings? Should the trial court provide some other definition not contained in the

statute, even though the jury is expected to provide its own understanding of the common meaning? Given that the interpretations of § 551.143 advocated by the court of appeals require explanations and definitions that are not contained in the statute, just how is the jury to know that this statute applies to walking or daisy-wheel quorums? Are the meanings just left for the jury to decide, without any meaningful guidance from the court, based on which lawyers' argument of the meaning of the law they prefer most?

It would be impossible for a trial court to charge a jury and remain true to the legal requirements of defining terms defined in the statute and not defining terms not defined by the statute without creating substantial uncertainty and confusion, especially since even the State concedes that the statutory definitions are inconsistent with the terms of § 551.143.

By the same token, not defining terms would leave the scope and meaning of the statute solely to the whims of what individual jurors thought that the statute might mean—though even the court of appeals contends, based on the AG opinions, that the statute means both more (walking quorum) and less (statutory definitions) that what it actually says.

In short, a trial court could not lawfully charge the jury in the way that the court of appeals has interpreted the statute. This uncertainty and vagueness is exactly what renders this statute unconstitutional because the statute's text,

standing alone, does not provide fair warning to a person of ordinary intelligence of what is within the scope of and prohibited by the statute, nor does it provide a reasonable opportunity for an ordinary person to steer clear of illegality.

D. The conspiracy statute fails to establish determinate guidelines for law enforcement to prevent arbitrary and discriminatory enforcement.

The expert witnesses testified that the potential for arbitrary and discriminatory enforcement is a real concern with the conspiracy statute. Riggs noted that prosecutors are not bound by attorney general opinions and have the discretion to interpret the statute as they see fit. When presented with certain hypotheticals, Riggs testified that the likelihood of prosecution could easily depend on the prosecutor or the court (3RR46, 50). Moreover, prosecutors could use the vague statute to selectively target "those whose communications they don't like" (3RR50-51, 60-61). Likewise, Charlie Zech surmised that the statute's enforcement could turn on "how aggressive or ambitious your district attorney is" (4RR27).

The exceptional rarity of the statute's enforcement demonstrates its intolerable arbitrariness. In the four decades since its enactment there has not been a single successful criminal conviction under § 551.143. A statute that is invoked with such infrequency is either a solution looking for a problem or is fundamentally and hopelessly flawed—or in the worst case scenario, both.

When the Supreme Court found the death penalty unconstitutional as administered in 1972, Justice Potter observed that the assessment of the death penalty was so arbitrary and capricious that it was comparable to being "struck by lightning." *Furman v. Georgia*, 408 U.S. 238, 309-310, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (conc.). Justice White recognized that the "great infrequency" of the death sentence could not be justified by any meaningful basis, *id.*at 313, 92 S.Ct. 2726 (White, J., concurring), while Justice Brennan found that "it smacks of little more than a lottery system," *id.,* at 293, 92 S. Ct. at 2754 (conc.).

In *Johnson v. United States*, *supra*, the Supreme Court held that the test of time can demonstrate that a vague statute is unworkable. 135 S.Ct. at 2562 (observing that "experience is all the more instructive" in claims of unconstitutional vagueness), citing *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). The Court noted that the vague language of the residual clause had created "pervasive disagreement" as to its application, despite "repeated attempts and repeated failures" to craft a principled and objective standard. *Id.*, 135 S. Ct. 2551, 2558-60. The Court concluded that the statute's "hopeless indeterminacy" created an intolerable risk of arbitrary application. *Id.*, 135 S. Ct. 2551, 2558. No less is true in the current case.

The conspiracy statute suffers from the same hopeless indeterminacy, as demonstrated by the fact that it has languished on the books unused and has confused both practitioners and citizens for decades.

E. The uncertain meaning chills protected expression.

When a statute is capable of reaching First Amendment freedoms, vagueness doctrine demands an even greater degree of specificity. *Long*, 931 S.W.2d at 288. "Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Grayned*, 408 U.S. at 109, 92 S.Ct. at 2299 (internal ellipses and quotation marks omitted). The law must be sufficiently definite to avoid chilling protected expression. *Id.*

Because "deliberations" encompasses discussions about "any public business," the vague statute reaches a broad swath of protected speech. All of the witnesses testified that they feel compelled to avoid the many gray areas created by the vague language of the statute. Bojorquez counsels clients not to respond to e-mails (2RR62-63), to steer clear of social media (2RR53), to post notice of a "potential quorum" before private social events (2RR65), to delegate tasks to staff who are not subject to the Act (2RR76), and not to attend or participate in a town hall meeting (2RR123-25). According to Bojorquez, the statute causes "more and more power and decision making being given to government staff and away from elected officials, because elected officials have to be so careful about their

communications" (2RR76)—unless these staff are all part of a grand conspiracy to meet in number less than a quorum on behalf of their elected bosses to avoid TOMA, something most, if not all, of them would be surprised to learn.

Riggs explained that the ambiguity forces attorneys to give very conservative and restrictive advice that interferes with a member's ability to communicate with constituents (3RR41-42). Riggs noted the statute's express terms prohibit a single board member from communicating one-on-one with a member of the public about a policy issue. Since constituents have no right to speak at meetings they are effectively denied access to elected officials (3RR28-29, 211). Riggs also saw risk in a member of a government body writing a blog about policy issues or maintaining a public Facebook page that could be accessed by other board members, particularly if another member posted a comment (3RR34, 37).

Another factor contributing to the chilling effect is the absence of an affirmative defense for reliance on written legal advice. Section 551.144 provides for such a defense, which allows members to avoid criminal liability, but it is omitted from the conspiracy statute.

The compulsion to steer wide in ambiguous situations is also heightened because the statute's vague terms make it difficult to avoid the appearance of illegality, even when the actions are innocent, without risking that a prosecutor will

deem it a conspiracy to violate TOMA after the fact. State's witness White repeatedly testified that the only thing separating illegal from innocent conduct in various hypotheticals was whether the members had the specific intent to "to avoid compliance with the requirements of the Act." (5RR93, 95, 127, 128, 130-31, 136, 138, 147). When asked whether a member violated the statute by conducting an informal survey about an issue with other members, White testified that it would turn on whether the member had the intent to violate TOMA (5RR124).

Criminal intent is an intangible that can be proved only by circumstantial evidence. *Arnott v. State*, 498 S.W.2d 166, 177 (Tex. Crim. App. 1973) (op. on reh'g). No one wants to be put in the position of proving a negative; accordingly, most people try to avoid any conduct that could possibly be construed as suspicious or illegal, especially after-the-fact. But, as White's testimony demonstrated, almost any discussion among less than a quorum could raise suspicion and subject one to prosecution at the whim of any prosecutor. For example, Scott testified that he dodged casual conversations amongst council members in the lobby of City Hall to avoid the appearance of what someone might think was an illegal meeting (2RR263).

Moreover, because a "daisy chain" can form fortuitously, the only way a member can truly avoid the risk of bad optics is by never discussing public policy except in noticed meetings. Bojorquez observed that "they have to worry not just

about who they're talking to, but who the person they're talking to is talking to" (2RR74-75, 79, 120-21, 151), either before or afterwards.

Even worse, a member's earnest inquiry about whether a communication is permissible may be misconstrued as illegal intent under the statute. One common meaning of "circumvent" is to avoid or find a way around an obstacle, as in legally avoiding paying taxes. *See Asgeirsson v. Abbott*, 773 F. Supp. 2d 684, 706 (W.D. Tex. 2011), *aff'd*, 696 F.3d 454 (5th Cir. 2012) (construing § 551.143 such that "a meeting of less than a quorum is not a 'meeting' within the Act when there is no intent to avoid the Act's requirements"), quoting *Esperanza Peace & Justice Ctr. v. City of San Antonio*, 316 F.Supp.2d 433, 473 (W.D. Tex. 2001).

Under this common understanding of "circumvent," any conscious effort to restrict conversations to less-than-a-quorum numbers in order to avoid triggering TOMA's requirements looks like (or could be argued or spun to be) a scheme to violate the statute. Bojorquez has difficulty advising members on how to lawfully work outside the reach of TOMA by, for example, creating an advisory committee of less than a quorum to avoid triggering the notice and agenda rules. (2RR149-50, 216). Likewise, Riggs observed that the conspiracy statute is paradoxical because "the very act of trying to keep it legal [by meeting in less than a quorum] could be what helps prove, under 143, a conspiracy." (3RR47). In other words, the harder

you try to not to violate the Act, the more you look like you are "conspiring" to "circumvent" it.

All of these factors cumulate to create a significant chilling effect as members of government bodies try to discern and navigate around the unlawful zone. Accordingly, practitioners such as Bojorquez, Riggs, and Zech simply advise members of government bodies to refrain from talking to each other outside of posted meetings, period (2RR64, 74-76; 3RR48, 51; 4RR28-29). As a result, the statute chills the free exchange of ideas that is so critical in shaping public policy.

The evidence, viewed in the light most favorable to the trial court's ruling, amply demonstrates that the conspiracy statute is hopelessly ambiguous such that neither experts nor citizens subject to TOMA can ascertain what conduct is prohibited. The intractable uncertainty as to how prosecutors, judges, and juries will interpret the statute compels practitioners to provide restrictive advice on protected speech that severely hampers elected officials' legitimate and constitutionally protected ability to perform essential functions and serve their communities. This Court should affirm the trial court's ruling invalidating § 551.143 as unconstitutionally vague and ambiguous.

Issue Two: Section 551.143 violates the First Amendment and is overbroad.

The court of appeals erroneously found that § 551.143 is a content neutral regulation directed at conduct rather than protected speech, and thus applied the wrong standard of review (rational basis rather than strict scrutiny) and erroneously imposed the burden on Appellees to demonstrate that the statute is unconstitutional.

A. Section 551.143 is a content based prohibition subject to strict scrutiny.

The First Amendment—which prohibits laws "abridging the freedom of speech"—limits the government's power to regulate speech based on its substantive content. U.S. Const. amend. I; *Reed v. Town of Gilbert, Ariz.,*135 S.Ct. 2218, 2226, 192 L.Ed.2d 236 (2015). When the government seeks to restrict and punish speech based on its content, the usual presumption of constitutionality is reversed. *Ex parte Lo*, 424 S.W.3d 10, 15 (Tex. Crim. App. 2013). Content based regulations are presumptively invalid, and the government bears the burden to rebut that presumption. *Id.* The Supreme Court applies the "most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Id.*

1. The court of appeals applied the wrong standard in finding § 551.143 content neutral.

The court of appeals, quoting *Asgeirsson v. Abbott*, 696 F.3d 454, 458 (5th Cir. 2012), held that § 551.143 is not content based because:

> … a regulation is not content-based merely because the applicability of the regulation depends on the content of the speech. A statute that appears content based on its face may still be deemed content-neutral if it is justified without regard to the content of the speech.

Doyal at *3, quoting *Asgeirsson* at 459-60.

In applying this analysis, the court of appeals rejected Appellees' arguments that the *Asgeirrson* analysis was abrogated by *Reed v. Town of Gilbert.* The *Reed* Court held:

> A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech …. In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral.

135 S. Ct. at 2228.

These two decisions are incompatible. *Auspro Enterprises, LP v. Texas Dep't of Transp.*, 506 S.W.3d 688, 691, 694 (Tex. App.—Austin 2016, pet. filed) (observing that the *Reed* Court "emphatically rejected" the notion that content neutral justifications or motivations will render content neutral, and thus subject to only intermediate scrutiny, statutes that on their face differentiate between categories of speech based on topic or ideas expressed); *Champion v.*

Commonwealth, 520 S.W.3d 331, 336 (Ky. 2017) (disregarding lower court's analysis that preceded *Reed*'s "paradigm shift"). The only reason the court of appeals advanced for applying Fifth Circuit precedent over contrary subsequent Supreme Court authority is that *Reed* did not "mention or discuss" *Asgeirsson.*

Reed clarified that government regulation of speech is content based, and thus subject to strict scrutiny, if a law applies to particular speech because of (1) the topic discussed, (2) the idea or message, or (3) its function or purpose. *Id.* at 2227.

Because "deliberation" is defined as "a verbal exchange … concerning an issue within the jurisdiction of the governmental body or any public business," the conspiracy statute on its face regulates speech because of the topic discussed. Tex. Gov't Code, § 551.001(2) (West 2017) (defining "deliberation"); *see Carey v. Brown*, 447 U.S. 455, 462, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980) ("peaceful picketing" statute that "accorded preferential treatment to expression concerning one particular subject matter—labor disputes—while prohibiting discussion of all other issues" was content based); *Burson v. Freeman*, 504 U.S. 191, 197, 112 S. Ct. 1846, 1850, 119 L. Ed. 2d 5 (1992) (regulation was content based because it conditioned individuals' exercise of free speech rights "entirely on whether their speech [was] related to a political campaign"); *Republican Party of Minnesota v. White*, 536 U.S. 765, 774, 122 S. Ct. 2528, 2534, 153 L. Ed. 2d 694 (2002)

(Minnesota Supreme Court's canon of conduct, which prohibited judicial candidates from discussing their views on disputed legal or political issues was content based).

Additionally, the conspiracy statute is content based because it defines the regulated speech by its function and purpose: discussing issues "within the jurisdiction of the governmental body or any public business." Tex. Gov't Code § 551.001(2) (West 2017) (defining "deliberation").

2. The court of appeals erred in finding that § 551.143 regulates conduct rather than speech.

The court of appeals held that § 551.143 is directed at conduct: the act of "conspiring to engage in deliberations that circumvent the requirements of TOMA." *Doyal* at *4. Accordingly, it applied rational basis review to determine if the statute has a rational relationship to a legitimate state purpose. *Id.* at *2, 5. According to the court of appeals, § 551.143 is comparable to the disorderly conduct statute criminalizing displaying a firearm in public "in a manner calculated to alarm." *See Ex parte Poe*, 491 S.W.3d 348, 354 (Tex. App.--Beaumont 2016, pet. ref'd) (upholding statute targeting the conduct of displaying a firearm in a public place in a manner calculated to alarm).

It is well-established that there is no First Amendment protection for speech that is integral to criminal conduct. *See Stevens*, 559 U.S. at 468-69, 130 S.Ct. at 1584-85

(obscenity, defamation, fraud, incitement, and speech integral to criminal conduct are not constitutionally protected speech). But this principle is invoked to uphold laws in which the gravamen of the offense is clearly harmful conduct, such as extortion, soliciting an illegal transaction, or assuming another's identity without consent. *See Sanchez v. State*, 995 S.W.2d 677, 687 (Tex. Crim. App. 1999) (upholding sexual harassment provision of the official oppression statute because extortionate speech is not constitutionally protected); *Ex parte Lo*, 424 S.W.3d 10, 17 (Tex. Crim. App. 2013) (noting in dicta that the conduct of requesting a minor to engage in illegal sexual acts falls outside the ambit of First Amendment protection); *Ex parte Bradshaw*, 501 S.W.3d 665, 674 (Tex. App.—Dallas 2016, pet. ref'd) (upholding statute prohibiting the act of assuming another person's identity, without that person's consent, with the intent to harm, defraud, intimidate, or threaten any person by creating a web page or posting or sending a message).

In contrast, the act of "conspiring to engage in deliberations that circumvent the requirements of TOMA" does not involve any conduct other than the deliberations themselves. Per the court of appeals' suggested definition, "conspiring" is simply agreeing to do some act. Deliberating is a joint undertaking that necessarily involves at least a tacit agreement. *Doyal* at *4. The State's own expert repeatedly testified that the only thing separating illegal from innocent discussions in numerous hypotheticals was whether the members had the specific

intent to "to avoid compliance with the requirements of the Act." (5RR93, 95, 127, 128, 130-31, 136, 138, 147). A law is not directed at conduct if the only thing distinguishing unlawful from lawful speech is the speaker's intent.

The Supreme Court has provided examples of laws targeting conduct and imposing only "incidental burdens" on speech: a ban on race-based hiring may require employers to remove "White Applicants Only" signs; an ordinance against outdoor fires may forbid burning a flag; and antitrust laws can prohibit "agreements in restraint of trade." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566–67, 131 S. Ct. 2653, 2664–65, 180 L. Ed. 2d 544 (2011). In contrast, the *Sorrell* Court rejected Vermont's argument that its law prohibiting pharmacies from selling prescriber information for the purpose of pharmaceutical marketing was directed at conduct (sales, transfer, and use of prescriber information) rather than speech. *Id.*, 564 U.S. at 570, 131 S. Ct. at 2666. The Court recognized that the law did not simply have an effect on speech—it was actually directed at certain content and aimed at particular speakers. *Id.*, 564 U.S. at 567, 131 S. Ct. at 2665. Thus it was the state's burden to justify its content- and speaker-based law as consistent with the First Amendment. *Id.,* 564 U.S. at 571–72, 131 S. Ct. at 2667.

If restrictions on selling commercial information as a commodity target protected speech, then a law prohibiting discussion of "any public business" by

less than a quorum is likewise a content- and speaker-based law subject to First Amendment scrutiny.

Similarly, in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27, 130 S. Ct. 2705, 2723–24, 177 L. Ed. 2d 355 (2010), the Supreme Court rejected the government's assertion that a federal law prohibiting knowingly providing material support (including "expert advice," "training," and "services") to a foreign terrorist organization targeted conduct and only incidentally burdened expression. Because the law regulated the plaintiffs' speech based on what they said and who they said it to, it was subject to strict scrutiny. *Id.,* 561 U.S. at 27-28, 130 S.Ct. at 2723-24; *McCullen v. Coakley*, 134 S. Ct. 2518, 2530, 189 L. Ed. 2d 502 (2014).

In fact, the court of appeals contrasted the sign code ordinances examined in *Reed* as laws directed at speech, rather than conduct, even though the challenged provisions involved time limitations for the display of certain signs. *Doyal* at *4, citing *Reed,* 135 S.Ct. at 2225. It makes no sense to categorize the posting and removing of signs as "speech," but deliberating as "conduct."

Because the conspiracy statute targets discussion of "any public business" it is better categorized as targeting "pure speech," rather than harmful, constitutionally unprotected conduct such as displaying a firearm. *See Virginia v. Hicks*, 539 U.S. 113, 124, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003) (concern with

overbreadth "attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct").

Moreover, § 551.143 does not just regulate speech—it regulates the "core political speech" that courts characterize as the "zenith" of First Amendment protected speech. *See Meyer v. Grant*, 486 U.S. 414, 425, 108 S. Ct. 1886, 1894, 100 L. Ed. 2d 425 (1988) (petition circulation is core political speech because it involves both the expression of a desire for political change and a discussion of the merits of the proposed change); *Buckley v. Am. Constitutional Law Found*., 525 U.S. 182, 186, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999) (core political speech involves "interactive communication concerning political change").

Accordingly, the court of appeals erred in applying mere rational basis analysis.

3. Section 551.143 is not merely a disclosure law.

The State has argued that § 551.143 is subject to intermediate scrutiny because it is a disclosure statute comparable to the campaign disclosure laws upheld in *Citizens United v. Fed. Election Com'n*, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010). But the conspiracy statute does not merely require disclosure; instead, it functions as a prior restraint and criminalizes violation of that prior restraint.

In *Citizens United*, the Court upheld disclosure laws that required political advertisements to contain disclaimers indicating who paid for them. The Court specified that the disclosure laws may burden the ability to speak, but they "do not prevent anyone from speaking." 558 U.S. 310, 366, 130 S. Ct. 876, 914, 175 L. Ed. 2d 753 (2010). The Court acknowledged that the disclosure laws would be unconstitutional as applied if they chilled speech due to potential threats or harassment, but found no evidence of chilling in the record. *Id.,* 558 U.S. at 370, 130 S. Ct. at 916.

On the other hand, the Court struck down provisions limiting corporate expenditures on campaign ads. The Court found that the provisions functioned as a prior restraint because of the complexity of the regulations, the threat of criminal liability, and the heavy costs of defending against FEC enforcement. *Id.* at 311-12, 335, 130 S.Ct. at 882, 895. Any speech arguably within the reach of the law would be chilled because many would choose simply to abstain from protected speech, harming the marketplace of ideas. *Id.* The Court emphasized that the "right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Id.* at 339, 130 S. Ct. at 898. Accordingly, the Court applied strict scrutiny. *Id.* at 340, 130 S. Ct. at 898.

As discussed in Judge Doyal's brief, a "disclosure" law is one that opens up and reveals past events such as campaign contributions.[7] Section 551.143 does not merely require disclosure; it is a prohibition on speech within its scope. The Fifth Circuit has acknowledged that subsequent disclosure of deliberations conducted outside of posted public meetings would not immunize a member from prosecution under TOMA's criminal provisions. *Asgeirsson*, 696 F.3d at 463-64.

Bojorquez characterized the conspiracy statute as a prior restraint on political speech because it "deters conversations in public life that would otherwise be perfectly legal" due to a legitimate fear of prosecution (2RR66, 152). He explained the critical distinction between a rule requiring disclosure of a past fact, such as a campaign contribution, and a rule that subjects even informal conversations to temporal delays and other conditions unrelated to disclosure, such as assembling a quorum (2RR46-47, 115, 199-201). These conditions function as a significant deterrent to speech in the real world of local government where time-sensitive developments frequently arise, particularly for unpaid members who are juggling jobs and families (2RR47, 153).

Moreover, Riggs observed that the statute's text is broad enough to reach one official talking to a member of the public. Because the public have no right to

[7] Brief of Appellee Craig Doyal at 10-11.

speak at meetings, the statute cuts off all communications between elected officials and their constituents (3RR28-29).

Just like the expenditure laws struck down in *Citizens United,* the conspiracy statute functions as a prior restraint. The statute's ambiguity and the threat of criminal liability chill important political speech by causing many to simply refrain from having conversations. *Id.* at 311-12, 335, 130 S.Ct. at 882, 895. Zech, who represents entities subject to TOMA, testified that when he advises members to consult with their own counsel, "they usually just don't talk about it" (4RR85). As in *Citizen's United*, this chilling effect harms the "marketplace of ideas": the right of citizens "to inquire, to hear, to speak, and to use information to reach consensus." *Id.* at 339, 130 S. Ct. at 898.

B. The State has not met its burden of demonstrating that § 551.143 is necessary to serve a compelling government interest and narrowly drawn.

To satisfy strict scrutiny, a law that regulates speech must be (1) necessary to serve a compelling state interest and (2) narrowly drawn. *Lo*, 424 S.W.3d at 15. These are fluid concepts: an ill fit between a law restricting speech and the interest it is said to serve can evidence both lack of narrow tailoring and the absence of a compelling interest. *Denver Area Educ. Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 806, 116 S. Ct. 2374, 2416, 135 L. Ed. 2d 888 (1996) (Souter, J., conc.).

A law is narrowly drawn if it employs the least restrictive means to achieve its goal and if there is a close nexus between the government's compelling interest and the restriction. *Lo*, 424 S.W.3d at 15. If a less restrictive means of meeting the compelling interest could be at least as effective, then a law does not satisfy strict scrutiny. *Id*. at 15-16.

The State has advanced many arguments concerning the legitimate interests served by TOMA in general. But Appellees have not challenged the entirety of TOMA or TOMA generally. The challenge is limited to § 551.143. The State has failed to even make an effort to demonstrate, much less actually demonstrate, that the conspiracy statute, which is unconstitutionally vague on its face and chills a broad swath of protected political speech, is necessary and narrowly tailored to serve a compelling state interest.

1. The conspiracy statute is not necessary to achieve the government's interest in transparency.

To satisfy strict scrutiny, a law that regulates speech must be necessary to serve a compelling state interest. *Lo*, 424 S.W.3d at 15.

As discussed above, the conspiracy statute has not yielded a single successful criminal conviction in the four decades since its enactment. This is compelling evidence that the criminal conspiracy statute is unnecessary in the regulatory scheme because there is no widespread, or even isolated, problem of local government bodies conspiring to flout the rules. Even after the attorney

general attempted to address the statute's ambiguity by advising that the statute is intended to target a "walking quorum," no conviction has been secured under this, or any other, theory (2RR57). One might reasonably expect that if there were a serious problem with walking quorums, i.e., a compelling problem (interest) that needed to be addressed by a criminal statute, there would be both a multitude of examples of it and reported criminal prosecutions. There is neither. There is instead only evidence that significant amounts of practical, necessary, and protected speech have been stifled and quashed.

2. No other state criminalizes meeting in less than a quorum.

While all states have open meetings laws, only a minority of states have criminal provisions, and none has a conspiracy provision like section 551.143.[8] These provisions typically prohibit willful or intentional "violation" of open meetings rules, thereby avoiding the problem that the term "circumvent" creates in ensnaring earnest efforts to comply with TOMA. 6RR691-92. Moreover, other states' civil statutes concerning serial communications or "walking quorums" have focused on the intent to reach a binding agreement,[9] but the Texas conspiracy statute prohibits even preliminary discussion and exchange of ideas.

In *Ex parte Lo,* the Court examined other states' laws prohibiting online solicitation of a minor. The Court found that every other state expressly required either obscene communications or the specific intent to solicit an illegal sex act with a minor, while the Texas statute prohibited sexual expression that is merely indecent. 424 S.W.3d at 22-23. The Court concluded that the Texas statute was not narrowly tailored to serve a compelling interest. *Id.* at 24.

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[8] 6RR691-92; Devon Helfmeyer, *Do Public Officials Leave Their Constitutional Rights at the Ballot Box? A commentary on the Texas Open Meetings Act*, 15 TEX. J. CIVIL LIB. & CIVIL RIGHTS 205, 227-28 (2010) (listing all nineteen states along with their penalties).

[9] A Kansas civil statute prohibits "interractive communications in a series" that "collectively involve a majority" and "are intended by any or all of the participants to reach agreement on a matter that would require binding action to be taken by the public body or agency." K.S.A. 2016 Supp. 75-4318(f). A "knowing" or "purposeful" violation of its requirements is subject only to civil fines. K.S.A. 2016 Supp. 75-4320(a). Similarly, a court construing Louisiana open meetings law found that that only serial communications that are structured to have "secretive binding force on at least a quorum" would violate the rules. *Mabry v. Union Parish School Board*, 974 So.2d 787, 789 (La. App. 2014).

As in *Lo*, Texas stands alone in criminalizing policy discussions among less than a quorum. There is no compelling basis for such a prohibition and it is not narrowly tailored to address a compelling interest.

3. Other TOMA provisions are sufficient to ensure compliance.

Appellees' experts, each of whom has substantial experience advising and representing entities subject to TOMA, observed that TOMA would be equally effective at achieving transparency without the conspiracy statute.

Foremost, § 551.144 provides criminal penalties for knowingly participating in or organizing any "closed meeting" that is "not permitted under this chapter." Tex. Gov't Code Ann. § 551.144 (a) (West 2017). The State has acknowledged that this provision "is directed at the very same evil" as the conspiracy statute.[10] This provision is a strong deterrent because a member can be held criminally responsible for his involvement even if he is unaware that the closed meeting is not permitted. *Tovar v. State*, 978 S.W.2d 584, 587 (Tex. Crim. App. 1998). Section 551.144 imposes a duty, subject to criminal sanctions, to hold open meetings unless an exception applies. *Id.* This provision does not suffer from the drafting errors and other ambiguities that plague § 551.143. Its terms are used consistently with their provided definitions and it prohibits only improper actions undertaken by a quorum. *See* § 551.001 (1) (defining "closed meeting" as "a meeting to which the public does not have access"). Moreover, § 551.144 provides an affirmative

[10] State's Brief in the Court of Appeals at 31.

defense for members who rely on written legal advice, obviating the need for practitioners to provide restrictive advice that chills important political speech. *See id.*, § 551.144 (c) (West 2017).

TOMA also provides several effective civil remedies for violations. Section 551.141 allows for all actions taken during an unlawful closed meeting to be voidable. Section 551.142 grants standing to any "interested person" and allows for the award of reasonable attorney fees, providing an incentive for attorneys to enforce TOMA. Bojorquez testified that voidability is a consequence that is taken very seriously because of the dire financial implications of voiding public contracts (2RR70-72). He also pointed out that courts will sometimes award attorney's fees and court costs even where there is no injunction (2RR72).

In *Lo*, the Court found that the challenged online solicitation law did "not serve any compelling interest that is not already served by a separate, more narrowly drawn, statutory provision." *Lo*, 424 S.W.3d at 19. Likewise, the State has not presented any evidence or arguments that the conspiracy statute is necessary to incentivize members of government bodies to adhere to the law, nor has it shown that TOMA would be rendered toothless without it.

4. The legislature's self-exemption belies any compelling interest.

As described by experts Bojorquez and Riggs, while TOMA was written to apply to the Texas House and Senate, committees of these bodies routinely invoke an exemption under their own rules (2RR162-63, 3RR57-58). One legislator related to Mayor Jessup that without the exemption they would "never get anything done" (2RR255).

The State cannot show that a compelling government interest underlies open meetings laws when the legislative bodies that generate the most important state and federal laws are not subject to them. Nor has State shown that the career politicians that serve in the legislature are less prone to corruption than local government officials, many of whom are simply civic-minded unpaid volunteers.

Where government fails to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546–47, 113 S. Ct. 2217, 2234, 124 L. Ed. 2d 472 (1993). A law cannot be regarded as protecting an interest "of the highest order" when it leaves appreciable damage to that supposedly vital interest unprohibited. *Id.*

Under inclusiveness is not necessarily fatal; courts recognize that a state need not address all aspects of a problem in one fell swoop and policymakers may focus on their most pressing concerns. *See Williams-Yulee v. Florida Bar*, 135 S.

Ct. 1656, 1668, 191 L. Ed. 2d 570 (2015). But this is not a matter of prioritizing. TOMA as written would apply to the legislature but for its subsequent act of exempting itself. In any event, the State has not suggested that corruption in local government is a more pressing concern that deserves differential treatment and priority.

The interest in government transparency must be balanced with an equally important interest in informed and efficient government. Both are important, but neither can be described as compelling. The legislature has determined that the toll TOMA takes on its own efficiency is incompatible with its ability to function, but members of local government bodies do not have a choice. As Mayor Kuykendall testified, council members arrive at meetings unprepared because of the restrictions on communications, so scheduled meetings are often several hours long, a huge burden for council members with full-time jobs (3RR112-13).

The State has not identified any justifiable basis for this differential treatment of entities tasked with legislative or rule-making authority.

5. The conspiracy statute is overbroad and not narrowly tailored.

The Government may not suppress lawful speech as the means to suppress unlawful speech. *Lo*, 424 S.W.3d at 18; *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). This rule reflects the judgment that "[t]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted[.]" *Id.*; *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

Accordingly, it is not enough to show that the State's ends are compelling; the means must be carefully tailored to achieve those ends without unnecessarily interfering with First Amendment freedoms. *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126, 109 S. Ct. 2829, 2836-37, 106 L. Ed. 2d 93 (1989). A law is not narrowly tailored if a less restrictive means of meeting the compelling interest could be at least as effective. *Lo*, 424 S.W.3d at 15-16.

Even assuming that there exists a compelling problem of members of government bodies "cooking the deal" behind the scenes, the conspiracy statute is not narrowly tailored to address this problem. It goes beyond targeting serial communications intended to reach a binding agreement—it prohibits virtually any discussion of public business among less than a quorum.

According to the First Amendment overbreadth doctrine a statute is facially invalid if it prohibits a "substantial" amount of protected speech "judged in relation to the statute's plainly legitimate sweep." *Virginia v. Hicks*, 539 U.S. 113, 118–19, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003).

The statute's plainly legitimate sweep—planned, secret meetings to make policy decisions outside of public view—is substantially outweighed by the protected speech chilled by the conspiracy statute. Elected officials are chilled from communicating with one another and constituents to learn about an issue or to discuss whether an issue warrants consideration by the entire governmental body. Riggs advised clients not to talk about public business with constituents, or if they did, to "keep your criminal defense lawyer on speed dial" (3RR51). The only place a member can ever safely talk about any kind of public business is in a public meeting after 72-hours posted notice (3RR48). Even communications initiated by concerned citizens could place a member at risk of prosecution (3RR52-53).

The court of appeals failed to acknowledge, much less address, these chilling effects. By adopting the attorney general's "walking quorum" interpretation of the statute, the court of appeals' analysis devolved into rewriting the statute.

In the context of an overbreadth challenge, it is improper to resolve ambiguous statutory language to avoid serious constitutional doubts. *Stevens*, 559 U.S. at 481, 130 S. Ct. at 1591 (statute criminalizing depictions of wounding or

killing of animals was substantially overbroad because government's proposed interpretation to require extreme cruelty amounts to "rewriting" the statute). Courts may impose a limiting construction on a statute only if it is "readily susceptible" to such a construction. *Id.* at 481, 130 S.Ct. at 1592. A court may not "rewrite" a law to conform it to constitutional requirements. *Id.* To do so would invade the legislative domain and diminish the legislature's incentive to draft a narrowly tailored law in the first place. *Id.*

Despite the State's insistence that the conspiracy statute applies only to serial communications that add up to a quorum, practitioners have been advising clients for decades to avoid any discussion of public business with other members or constituents outside of a noticed meeting because of the risk that such communication might fall within the scope of the conspiracy statute. Even if the State's argument reflects the belief of the current prosecutors, they have no ability to speak for or bind the hundreds of other prosecutors in Texas, much less assure that those prosecutors would only use the statute in the manner advanced by the current prosecutors. The State's promise to "use it responsibly" cannot justify upholding an overbroad statute. *Thompson*, 442 S.W.3d at 350; *Stevens*, 559 U.S. at 480, 130 S. Ct. at 1591.

The overbreadth of the statute is both real and substantial and renders the statute facially unconstitutional.

C. The conspiracy statute does not survive intermediate scrutiny.

Even under intermediate scrutiny, a regulation must be narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. *Thompson*, 442 S.W.3d at 344; *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). In *Ward,* the Supreme Court found that this requirement was met because the municipal noise regulation for music performances in the public band shell "continues to permit expressive activity" and "has no effect on the quantity or content of that expression." *Ward*, 491 U.S. at 802, 109 S.Ct. 2746.

The conspiracy statute, however, is not narrowly tailored to address the potential for officials to intentionally form "daisy chains" or "walking quorums," regardless of whether this interest is compelling or significant. Instead, its plain language forbids discussions of any public business in numbers less than a quorum. As Riggs observed, a narrowly tailored statute would explicitly prohibit "meeting in numbers of less than a quorum for the purpose of sequential or multiple secret deliberations that would together constitute a quorum" (3RR41).

In the absence of specific language describing a "walking quorum," the statute (1) fails to leave open ample alternative channels of communication, and (2) has a substantial effect on the quantity and content of expression. Its plain language reaches communications initiated by concerned citizens with officials

about public issues (3RR52-53); members talking to constituents to educate themselves on issues (3RR53-54); and members' staff discussing the concerns of their respective board members (3RR55). Even State's expert White testified that "deliberation" could include members merely educating themselves on policy issues, as well as discussions during routine city council agenda-setting meetings (5RR123, 136-38).

A statute that prevents members of government bodies from becoming informed about public policy or even planning an agenda does not leave open sufficient channels of communication. Moreover, because the attorney general has advised that "meeting" does not require physical presence and "verbal exchange" may also include written communication (neither of which is spelled out in the statute), practitioners have consistently counseled clients to avoid discussing policy issues in emails, blogs, and social media forums. (2RR45, 54-55; 3RR34-37). In light of its significant chilling effects, it cannot be argued that the conspiracy statute "has no effect on the quantity or content" of the regulated speech.

In *McCullen v. Coakley*, -- U.S. --, 34 S. Ct. 2518, 189 L. Ed. 2d 502 (2014), the Supreme Court held that a law failed intermediate scrutiny because the evidence showed that it actually prevented conversations. The Massachusetts statute at issue created a 35-foot buffer zone for protesters at abortion clinics. *Id.* at 2526. The Court was persuaded by the petitioners' testimony that the statute had

compromised their ability to converse with patients and noted that Massachusetts had failed to refute testimony that the conversations "have been far less frequent." *Id.* at 2535-37. In light of this evidence, the Court found that the court of appeals was "wrong to downplay these burdens on petitioners' speech." *Id.* at 2536. The Court noted that the fact that no other state had such a law evidenced a lack of narrow tailoring. *Id.* at 2537. Additionally, another provision criminalizing blocking entry or exit served to achieve the state's interest in a more tailored fashion, as did available civil sanctions and injunctive relief. *Id.* at 2537-38. Accordingly, Massachusetts failed demonstrate that alternative measures burdening substantially less speech would fail to achieve the its interests. *Id.* a 2538.

The parallels here are uncanny. The State has not refuted extensive testimony showing that Texas's uniquely broad statute has compelled members of government bodies to forgo perfectly lawful conversations with fellow members and with members of the public. Instead, the State's witnesses only further demonstrated the pervasive confusion about the statute's scope. Nor has the State shown that a more narrowly drafted statute explicitly prohibiting serial or sequential daisy-chain deliberations, along with TOMA's other remedies (including criminal penalties under § 551.144), would fail to achieve its interests. As in *McCullen*, the court of appeals erred in disregarding extensive evidence that

the statute burdens substantially more speech than is necessary to prevent corruption.

Section 551.143 thus fails both strict and intermediate scrutiny. This Court should affirm the trial court's ruling invalidating § 551.143 as an unconstitutional infringement on the freedom of expression.

PRAYER

Appellee Charlie Riley respectfully requests that the Court reverse the judgment of the Ninth Court of Appeals and reinstate the judgment of the trial court that § 551.143 is facially unconstitutional.

Respectfully submitted,
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CERTIFICATE OF SERVICE

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Pursuant to Texas Rule of Appellate Procedure 9.4 (i), the undersigned attorney certifies that the relevant sections of this computer-generated document have 14,488 words, based on the word count function of the word processing program used to create the document.

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